NATIONAL ENERGY MARKETERS ASSOCIATION

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July 1, 2011

The Honorable Kristi Izzo
Secretary
State of New Jersey
Board of Public Utilities
Two Gateway Center
Suite 801
Newark, New Jersey 07102
Via email: rule.comments@bpu.state.nj.us

Re: Docket No. EX11020089 - Energy Competition Standards, Proposed Readoption with Amendments N.J.A.C. 14:4

Dear Secretary Izzo:

The National Energy Marketers Association (NEM)[1] hereby submits comments on the Board's Proposed Readoption with Amendments of the Energy Competition Rules set forth at N.J.A.C. 14:4. As an initial matter, NEM notes its appreciation for Staff's efforts to engage the stakeholders in informal discussions about issues of concern with the Energy Competition Rules, beginning last year with the submission of comments and convening a workshop to have a dialogue about rule provisions that stakeholders felt were in need of revision. A number of the proposed rule modifications reflect improvements that were suggested by competitive suppliers. However, certain proposed

[1] NEM is a non-profit trade association representing both leading suppliers and major consumers of natural gas and electricity as well as energy-related products, services, information and advanced technologies throughout the United States, Canada and the European Union. NEM's membership includes independent power producers, suppliers of distributed generation, energy brokers, power traders, global commodity exchanges and clearing solutions, demand side and load management firms, direct marketing organizations, billing, back office, customer service and related information technology providers. NEM members also include inventors, patent holders, systems integrators, and developers of advanced metering, solar, fuel cell, lighting and power line technologies.

rule changes represent areas of serious concern, in particular the proposal that audio recordings of the entire marketing call be retained, instead of just the verification of enrollment, for a period of six months. NEM also recommends certain other rule changes that would facilitate competitive suppliers' ability to do business in New Jersey without diminishing necessary consumer protections.

I. The Board has Proposed a Number of Reasonable Rule Modifications that Will Enhance Suppliers Ability to Serve New Jersey Consumers

At the outset, NEM notes its support for a number of the proposed rule modifications. These proposed rule modifications are reasonable changes that represent common sense adaptation of the rules to the current state of market development and suppliers experience with how the rules have worked in practice over time. Specifically, Section 14:4-7.6(b)4 is proposed to be modified to provide a consumer with a seven calendar day right of contract rescission, instead of the current fourteen calendar day provision. As NEM explained in previously filed comments on the rules, the fourteen-day rescission period significantly increases marketer business risk as they procure supplies in a dynamic market to serve a consumer that has two weeks to change its mind. This increased risk is reflected in a higher energy price for consumers, making choice options less economic. NEM therefore supports the proposed change to a seven calendar day right of rescission.

There are additional positive enhancements being proposed in the rule readoption process. For instance, the zip+4 information that is currently required to be filed as part of the marketer license renewal process is now proposed in Section 14:4-5.5(e) to be provided to Staff within 5 days after a request. The filing requirement for this information at Section 14:4-5.7(d)3 is proposed to be stricken. Changing the reporting requirement is a reduction in burden to suppliers while requiring that the information be given to Staff upon request ensures that it is still made available should concerns arise. Additional positive changes to documentation requirements include the revision to Section 14:4-2.4(e) to eliminate certain supplier recordkeeping requirements for electronic enrollments as well as the change to Section 14:4-5.7(d)10 with respect to the documentation requirement that LDCs be provided with notice from the supplier of the supplier's submission of a license application to Board. The proposed revision would reasonably permit the use of an LDC email acknowledgement.

II. Reasonable Recordkeeping Requirements of Audio Verification of Consumers Switch to a Competitive Supplier Should be Adopted

NEM urged in previously filed comments with the Board that the mandated independent third party verification requirement for telephonic enrollments be modified to also permit a supplier to perform that function in-house. Some suppliers may want to utilize a third party and some may perform this function more effectively in-house and both should be permitted to do so consistent with their business model. However, mandating third party verification without also allowing other methods to verify the telephonic enrollment unnecessarily imposed an additional expense in the choice process that ultimately increased the cost of rendering energy service to consumers. The Board has now proposed to modify Section 14:4-2.3(c)2 to allow audio verification of a customer switch to be performed by a competitive supplier OR by an independent third party. For the foregoing reasons, NEM supports this change.

However, the Board has also proposed that suppliers now be required to tape the <u>entire</u> marketing portion of call, not just the verification of enrollment. Section 14:4-2.3(c)2.ix. Section 14:4-2.5(c) would require that telephone verifications be retained by suppliers for six months. NEM opposes the requirement that the entire marketing portion of the call be taped. A requirement for suppliers to tape all calls, all the time would be extremely expensive to comply with coupled with the burden and expense of retaining these voluminous records for six months. The Board has not justified the imposition of this costly new recordkeeping burden on the competitive industry. Indeed, the rules specify in Section 14:4-2.3(c)2 the required elements for the script for verification of a consumer enrollment. The supplier's recordation of the verification portion of the call should therefore be sufficient. Allowing suppliers to perform the audio verification of the enrollment in house in addition to third party providers does not change the validity of this methodology in verifying the consumer's intent to switch providers. But, requiring suppliers to tape the entire marketing call significantly undermines the cost effectiveness of telephonic enrollment as a means to acquire customers. NEM notes that other jurisdictions rely on the script questions to satisfy potential concerns about marketing practices. Coupled with this, suppliers are subject to the enforcement provisions of the rules in proposed Section 14:4-2.8 for non-compliance with the switching requirements, which acts as a strong deterrent.

III. Affirmative Consent to Contract Renewal Should Not Be Required Except in the Case of a Material Change to the Contract

The Board has proposed a modification to Section 14:4-7.6(j), which currently requires a customer's affirmative written signature for renewal of a residential contract or the contract will continue on a month-to-month basis under the current terms and conditions and pricing, to also include an electronic signature as a means to obtain the consumer's consent to the renewal. While permitting electronic signatures as a means of obtaining consumer consent to contract renewal is an improvement, NEM is still fundamentally concerned with this rule. For example, when a customer signs up for marketer service on a fixed rate they cannot renew at a new fixed rate without affirmative consent to an entirely new contract. This is problematic because if the new contract is not obtained and the original fixed rate contract continues on a month-to-month basis "under the current terms and condition and pricing" the customer may be paying at the original fixed rate that could be higher than the current rate. NEM suggests that as a general rule that a consumer should not be required to provide affirmative consent to a contract renewal with a rate change when they have received prior notice. NEM believes this methodology comports with consumer expectations of notice of service terms and changes and likewise provides the consumer with adequate protection. Indeed, the consumer will receive prior notice of the impending price change from the supplier and has given implicit acceptance of the renewal by not making further inquiry with the supplier. This is common practice for the renewal of consumer goods and services. Similarly, by limiting the situations when affirmative consent is required, it does not unnecessarily impose burdensome and expensive renewal processes on marketers.

IV. Additional Areas of Concern with the Energy Competition Rules

There are certain other provisions of the Energy Competition Rules that the Board has not proposed to modify in this readoption process but for which NEM respectfully requests the Board consider changes as set forth below:

A. The Requirement of Thirty Days Written Notice of Termination Should Be Eliminated, Particularly in the Absence of Nonrecourse Utility Purchase of Receivables Programs

Until utility nonrecourse Purchase of Receivable (POR) programs are made available statewide, NEM urges the Board to consider eliminating the requirement for a supplier to provide a consumer with thirty days written notice of termination. The requirement for thirty days written notice of termination is set forth in Sections 14:4-7.6(b)(5) and Section 14:4-7.10. NEM submits that this requirement is onerous for marketers to comply with, particularly in the case where the marketer seeks to terminate the customer for nonpayment. By the terms of this Section, the marketer will have to retain the non-paying customer for an additional month, likely without payment for that period as well. It should constitute adequate notice from the marketer if the enrollment materials clearly state that service will be discontinued for nonpayment without requiring an additional month of exposure on the part of the marketer. Moreover, when TPS service ends, the consumer reverts backs to utility service, and so there is no need for an additional layer of consumer protection.

NEM does however point out that the burden of the thirty day written notice requirement could be eliminated by the statewide availability of utility non-recourse purchase of receivable (POR) programs. NEM notes that Staff is currently conducting a stakeholder workgroup on utility POR programs. NEM strongly supports POR as a means to facilitate retail market development. The thirty day written notice requirement is but one of many retail market issues that would be resolved by adoption of nonrecourse utility POR programs.

B. Marketing Standards Should Be Modified to Better Express the Value of Varied Competitive Offerings

As previously noted in NEM comments to the Board on the Energy Competition Rules, Sections 14:4-7.3 and 14:4-7.4(b) pertaining to the content of marketer advertisements and marketing materials are problematic in the singular focus on “savings” as the only, or predominant, value proposition to be derived by the consumer. As currently written, by focusing on savings as the manner in which to communicate product value, the rules discourage marketer offerings of innovative products and services. NEM does note that certain modifications were made these Sections in the Board’s last readoption of the rules.[2] These changes clarified in Section 14:4-7.4(c) the ability of a marketer to petition the Board to utilize different information to describe its product offering and also added to Section 14:4-7.4(a)(1) the requirement to provide a toll free number to disclose the average price of energy over the term of a contract. This was intended to better accommodate variable price offerings whose absolute value could not be determined at the start of a contract. NEM submits that in practice these rule changes are cumbersome for a supplier to utilize and have not materially improved the underlying problem that NEM identified with the rules.

[2] NJBPU Final Readoption With Amendments, N.J.A.C. 14:4, Energy Competition Standards, N.J.A.C. 14:8, Renewable Energy and Energy Efficiency, effective May 19, 2008, at pages 14-15.

NEM reiterates its suggestion that the language in Section 14:4-7.4(b) could be further improved to allow marketers to provide consumers with the price transparency and accuracy that they deserve. We continue to believe that the alternatives in Section 14:4-7.4(b) for describing products in marketing materials do not satisfactorily accomplish the goal of communicating the value of energy choices in a clear and understandable manner.

For example, the requirement to provide the marketer rate, the utility commodity rate and an all-in comparison with the utility delivery rate to compute consumer savings can mislead consumers. By providing a savings calculation that includes the utility delivery rate it acts to artificially dilute the commodity savings the consumer would realize. And, since the only portion of the bill the consumer can shop for is commodity, it is misleading to require an all-in rate computation that includes utility delivery. We also request Board clarification of the instances when a marketer should employ Section 14:4-7.4(b)(1) versus Section 14:4-7.4(b)(2).

C. Marketing Standards Should be Expressed in a Competitively Neutral Fashion

NEM suggests that Section 14:4-7.4(f) be reworded in a more competitively neutral manner. As currently set forth, this Section requires suppliers' consumer solicitations and marketing materials to include a statement that, "switching to a competitive third-party supplier is not mandatory, and the customer has the option of remaining with the LDC for basic generation service or basic gas supply service." NEM recommends that this section be reworded to the effect that, "all consumers have the choice of switching to a competitive energy supplier, and the reliability of your delivery service will in no way be affected by your choice of a new energy supplier..”[3] When expressed in this fashion, the rule does not have the potential negative connotation that the current language carries and also does not require the supplier to, in effect, promote the utilities’ commodity service in the supplier’s own marketing materials.

D. An Examination of Appropriate Utility Credit Requirements Based on Capacity Obligations Should be Undertaken

There are four different credit requirements in the New Jersey utility Third Party Supplier programs for electricity. First, the Board requires in the rules that suppliers post a surety bond as part of the initial licensing process and that the supplier then maintain that bond going forward. Sections 14:4-5.4(f)-(i) and 14:4-5.5(e). Second, PJM has a credit requirement based on the supplier’s load served and the billing/payment schedule. The utilities impose two additional credit requirements: one is based on the customer receivable in the case that the TPS is the consolidated billing party and the second is based on capacity obligation.

The PJM credit requirement covers electricity supply costs in the event of non-payment by the TPS. The Board credit requirement covers the state utility tax (SUT) due in the event of non-payment by the TPS.[4] The utility collateral requirement for TPS consolidated billing at 60 days of estimated receivables is rarely employed since the utility consolidated billing option is overwhelmingly selected by suppliers.

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[3] See additionally, NEM’s Consumer Bill of Rights available at: http://www.energymarketers.com/Documents/Consumer_Bill_of_Rightsfinal_formatted.pdf

[4] Although it is rather high relative to SUT risk for the early phases of TPS operation it covers about two months of SUT non-payment risk for a group of 20,000 to 25,000 residential equivalent customers.

NEM is specifically concerned about the utility credit requirement based on capacity obligation. It requires $9,000 of collateral per MW of residential and $6,000 per MW of commercial capacity obligation. It may start at $15,000 or so for a TPS at market entry,[5] but would grow to about $450,000 to $600,000 for a group of 20,000 to 25,000 residential equivalent customers.

NEM submits that there is no financial basis for this utility capacity obligation requirement. An event of TPS default does not pose a financial risk to a utility in any way. In fact, under utility consolidated billing the utility is in always in possession of TPS receivables. The parties at risk in the event of a TPS default are only PJM (electricity supplied not paid) and the State of NJ (SUT billed by the TPS and not yet remitted to the state). It is illogical for a party (the utility) to demand collateral from another party (the marketer) who can never owe them money.

The electricity marketers who entered the state in 1999 when the market opened had sufficient balance sheet strength or affiliate backing to absorb this unsubstantiated credit requirement without difficulty. Today, under improved market conditions there is a renewed opportunity to bring the price, service and technology benefits of retail competition to consumers in New Jersey, but this opportunity may be lost because the utilities are requiring suppliers to secure unnecessary credit or post unnecessary cash. Accordingly, NEM requests that the Board require the utilities to eliminate the $9,000 and $6,000 per MW credit requirement in the interest of competition and choice for consumers.

[5] JCP&L requests a flat $250,000 at market entry.

A similar situation exists on the gas side as well. The utilities require credit for pipeline capacity, even though marketers are also posting such credit to the pipeline itself. This is another unnecessarily duplicative credit requirement based on capacity obligation. Capacity assets should be made available on an equitable and non-discriminatory basis, both in terms of allocation and utilization rights.[6] In other words, assets should follow the customer. This ensures that customers have equal access to the assets for which they pay. In a retail choice environment, utilities need only retain those assets sufficient to meet their remaining firm commodity customer needs and to assure distribution system integrity on peak day and through the design winter period. Gas marketers should be able to use the combination of pipeline and storage assets to lower costs and thereby deliver the full benefits of competition to New Jersey gas customers. The rules should ensure that useable capacity is released to marketers at fair and equitable rates, not the most expensive and least useable capacity.

In sum, NEM recommends an examination of appropriate electric and natural gas utility credit requirements be undertaken.

[6] See N.J.A.C. 14:4-3.3(e) "An electric and/or gas public utility shall provide access to utility information, services, and unused capacity or supply on a non-discriminatory basis to all market participants, including affiliated and non-affiliated companies, except as provided for in N.J.A.C. 14:4-3.4, 3.5, and 3.6, provided

V. Conclusion

NEM appreciates the opportunity to submit its recommendations on the Energy Competition Rules and modifications that will promote the continued development of energy choice in New Jersey.

Respectfully submitted,

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the transactions specified in N.J.A.C. 14:4-3.6, competitive utility products and/or services, comply with all other applicable rules."